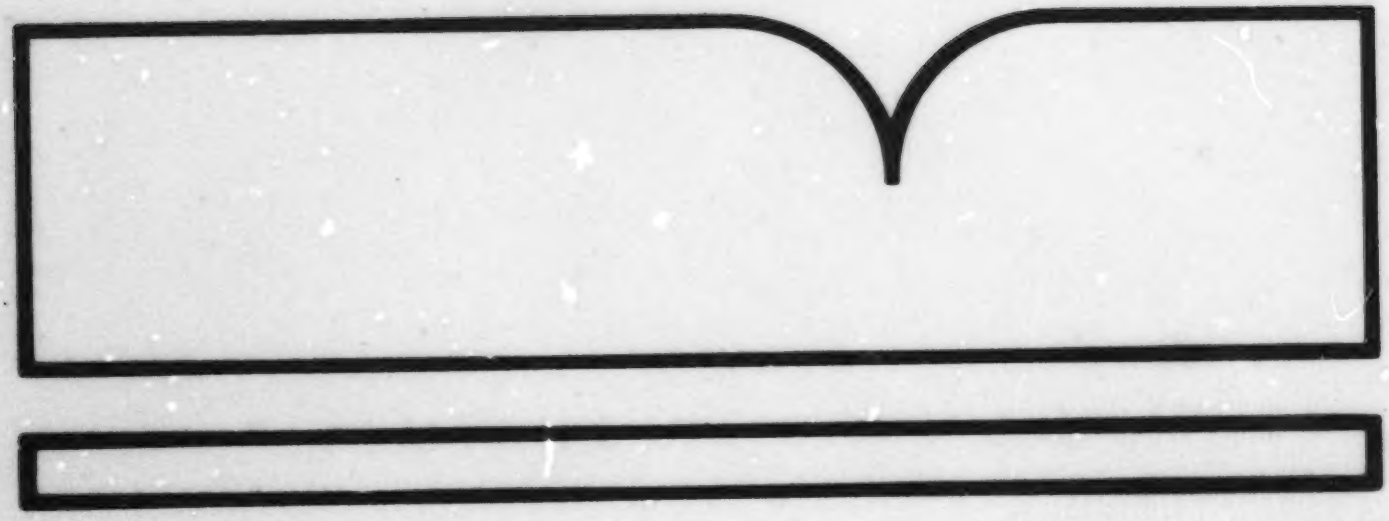
PB90-249525

Procurement under Preauthorization/Mixed Funding

(U.S.) Environmental Protection Agency, Washington, DC

19 Apr 89



U.S. Department of Commerce
National Technical Information Service
NTIS

PB90-249525

United States
Environmental Protection
Agency

Office of
Solid Waste and
Emergency Response

EPA

DIRECTIVE NUMBER: 9225.1-01

TITLE: Procurement Under Preauthorization/Mixed Funding

APPROVAL DATE: 4/19/89

EFFECTIVE DATE: 4/19/89

ORIGINATING OFFICE: OSWER/OERR/HSCD

☒ **FINAL**

☐ **DRAFT**

STATUS:

REFERENCE (other documents):

OSWER OSWER OSWER
E DIRECTIVE DIRECTIVE DI

REPRODUCED BY
U.S. DEPARTMENT OF COMMERCE
NATIONAL TECHNICAL
INFORMATION SERVICE
SPRINGFIELD, VA 22161

REPORT DOCUMENTATION PAGE Form Approved OMB No. 0704-0188

1. Agency Use Only: PB90-249525	2. Report Date: 04/19/89	3. Report Type And Dates Covered: DIRECTIVE	
4. Title And Subtitle: Procurement Under Preauthorization/Mixed Funding			5. Funding Numbers:
6. Author(s):			
7. Performing Organization Names And Addresses: Environmental Protection Agency Office of Solid Waste and Emergency Response 401 M Street SW Washington, DC 20460			8. Performing Organization Report Number: EPA/9225.1-01
9. Sponsoring/Monitoring Agency Name(s) And Address(es): Environmental Protection Agency Office of Emergency and Remedial Response 401 M Street SW Washington, DC 20460			10. Sponsoring/Monitoring Agency Report Number:
11. Supplementary Notes:			
12a. Distribution/Availability Statement:			12b. Distribution Code:
13. Abstract: Interim guidance to assist the Regions in clarifying procurement procedures that claimants: (1) would be required to implement under the CERCLA Response Claims Procedures; and (2) may use in order to assure that the costs for which their claims are made against the Hazardous Substance Superfund will be reimbursed by EPA.			
14. Subject Terms: SUPERFUND DOCUMENT: Remedial			15. Number Of Pages: 9
			16. Price Code: A02
17. Report Security Classication:	18. Page Security Classication:	19. Abstract Security Classication:	20. Media:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 19 1989

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

OSWER DIRECTIVE 9225.1-01

MEMORANDUM

SUBJECT: Procurement Under Preauthorization/Mixed Funding
OSWER Directive 9225.1-01

FROM: Henry L. Longest II, Director
Office of Emergency and Remedial Response

Bruce M. Diamond, Director
Office of Waste Programs Enforcement

TO: Regional Administrators
Regions I-X

PURPOSE

The purpose of this interim guidance is to assist the Regions in clarifying procurement procedures that claimants: (1) would be required to implement under the forthcoming CERCLA Response Claims Procedures; and (2) may use in order to assure that the costs for which their claims are made against the Hazardous Substance Superfund (the Fund) will be reimbursed by EPA.

INTRODUCTION AND BACKGROUND

Section 111 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, authorizes certain persons to seek reimbursement for response costs incurred in carrying out the National Contingency Plan (NCP). Section 112 of CERCLA directs the President (later delegated to EPA by Executive Order 12580) to establish the forms and procedures for filing claims against the Fund. The proposed CERCLA Response Claims Procedures are not expected to be published in the Federal Register until later in 1989 and will not be final until the final NCP is effective. Since we intend to preauthorize claims in the interim, EPA is issuing this guidance to clarify various procurement procedures that potential claimants may use in planning

and carrying out preauthorized response actions. Until the CERCLA Response Claims Procedures are promulgated, EPA will establish the terms and conditions for reimbursement of individual claims through a Preauthorization Decision Document (PDD). These PDDs govern all "claimants" including potentially responsible parties (PRPs), other non-PRP private parties, and States or their political subdivisions submitting claims as PRPs.

Preauthorization of a claim under the authority of section 111(a)(2) of CERCLA creates neither a Federal contract with, nor Federal assistance to a claimant. Accordingly, neither Federal acquisition regulations regarding procurements nor procurement regulations applicable to recipients of grants or cooperative agreements apply to claimants. EPA requires only that claimants' procurement practices be consistent with sound business judgement and good administrative practices, and that they maintain all records, documents, and other evidence that supports claimed costs. These records shall be maintained in accordance with generally accepted accounting principles and practices consistently applied. However, pending promulgation of the Response Claims Procedures, both current and future PDDs hold claimants to three major principles: (1) Their procurement transactions must provide to the maximum practicable extent open and free competition in selecting contractors, must not unduly restrict or eliminate competition, and, where applicable, must select the lowest responsive, responsible bidder; (2) They may award contracts to persons on the List of Parties Excluded from Federal Procurement or Non-Procurement only with EPA's prior approval; and (3) They must include in all fixed-price contracts for construction a "differing site conditions" clause, unless EPA waives the requirement.

Claimants and potential claimants have asked for guidance on the meaning of "sound business judgement and good administrative practices," or other aspects of the above principles in an effort to reduce the risk that EPA may subsequently find their costs ineligible for reimbursement. Unless expressly provided in the PDD, claimants are not required to follow the procurement procedures described below in order to receive reimbursement from the Fund. The procedures are offered only as a model and are the same as those reflected in EPA procurement guidance for State-lead response actions. See "Procurement Under Superfund Remedial Cooperative Agreements," OSWER Directive 9375.1-11 (June 1988) (hereinafter referred to as the "State Procurement Guidance"). Claimants may be guided by these procedures in proposing procedures in their request for preauthorization and in carrying out their own procurements once the response action is preauthorized by EPA. Each procurement method and contract type may be used under the appropriate circumstances. OERR is develop-

ing further guidance for potential claimants which explains the factors to be considered and the limitations of each type and method.

METHODS OF PROCUREMENT

In carrying out preauthorized removals, remedial investigation/feasibility studies (RI/FSs), remedial designs, and remedial actions or related activities, potential claimants should select qualified contractors on a competitive basis. The following guidance identifies procurement methods that may be used to achieve EPA procurement objectives, and discusses some of the reasons why EPA believes each method of procurement is appropriate for specific stages of the response action. The selection of a method is dependent on: (1) whether the procurement is for supplies, equipment, or architectural and engineering or construction services; (2) the certainty with which the quantity and quality of work can be described; and (3) the performance and cost and price factors that should be considered. The advantages and disadvantages of each method of procurement are described more fully in the State Procurement Guidance.

- Small Purchase Procurement Method - Potential claimants should consider negotiating purchases and contracts using this method if the aggregate amount, including overhead and profit, is not expected to exceed $25,000. More information both on small purchase as a procurement method and on the situations in which this type of procurement may be used is found in Chapter II of the State Procurement Guidance.

- Formal Advertising (Sealed Bidding) Procurement Method - Formal advertising should be considered for procurements over $25,000 when the potential claimant can provide a complete, adequate and realistic specification or purchase description; two or more responsible bidders are willing and able to compete; the procurement lends itself to the award of a fixed-price contract; and the selection of the successful bidder can be made principally on the basis of price. Formal advertising is characterized by public solicitation and opening of sealed bids followed by the award of a fixed-price agreement going to the lowest responsive, responsible bidder. Formal advertising may be used for non-time-critical removal and remedial construction. More information on procuring construction using formal advertising can be found in Chapters II and V of the State Procurement Guidance.

- Two-Step Formal Advertising (Sealed Bidding) - A variant of formal advertising is two-step formal advertising (i.e., a request for a technical proposal (RFTP) in the first step and an invitation for bids (IFB) in the second step only from those who submitted acceptable technical proposals). This method is designed to obtain the benefits of formal advertising when adequate and complete specifications are not available. The differences between the two types of formal advertising and the procedures for the two-step process are discussed in greater detail in Chapter V and Appendix A of the State Procurement Guidance.

- Competitive Negotiation (Competitive Proposals) Procurement Method - A potential claimant should use the competitive negotiation method of procurement only if the requirements for formal advertising are not met. This method may be used for remedial design and remedial actions. Another method of competitive negotiation, which may be used to procure architectural and engineering services, is the qualifications based method where selection is based upon qualifications rather than price. Additional information on the procurement of engineering services and competitive negotiation can be found in Chapter III of the State Procurement Guidance.

- Noncompetitive (Sole Source) Procurement Method - The noncompetitive method of procurement should be used only if the conditions of the first three methods of procurement are not met. For example, if an emergency situation arises, such as an imminent threat of contamination to a drinking water supply requiring a time-critical removal, the noncompetitive negotiation method may be used for the response action.

TYPES OF CONTRACTS

Under several of the procurement methods above, the potential claimant may propose one of three principal types of contracts or variants for the performance of different types of work.

- Fixed-Price Contract: Fixed-price type contracts provide for a firm price (lump sum, unit price or combination), or under appropriate circumstances may provide for an adjustable price, for the supplies or services being acquired. Consideration of a fixed-price contract is recommended where the scope of work can be clearly defined such as for construction and certain non-time-critical

removals. Additional information can be found in Chapter II of the State Procurement Guidance.

- o Cost-Reimbursement Contract: The cost-reimbursement type contract provides for the payment to the contractor of all (or sometimes a portion of) its allowable costs. Cost-reimbursement contracts establish an estimate of total costs and a cost ceiling. Consideration of a cost-reimbursement contract is recommended for the services of an architect or engineer. Additional information can be found in Chapter II of the State Procurement Guidance.

- o Time-and-Materials Contract: The time and materials type contract provides for the acquisition of supplies and services on the basis of direct labor hours at specified hourly rates and materials at cost. This type of contract usually contains a ceiling price which the contractor exceeds at its own risk. Consideration of time and materials contracts may be appropriate for response actions of unknown quantity and duration (e.g., in carrying out certain removal actions).

OTHER PROCUREMENT CONSIDERATIONS

Potentially responsible party claimants, in particular, should be aware that certain past activities may affect their ability to provide for full, open and free competition and thereby meet EPA procurement objectives. When first presented with the prospect of being potentially liable for cleanup of a site, it is not unusual for a PRP to hire a contractor to evaluate the RI/FS and cost estimates and to provide advice on the financial and/or technical implications of implementing the cleanup. Such an original procurement, as a practical matter, would have been entered into prior to any determination that mixed funding may be appropriate. If the PRPs' original procurement was awarded through open and free competition and the notice and subsequent contract provided for follow-on work of the nature proposed by the PRPs in a formal application for preauthorization, EPA may agree to the continued participation by such a qualified firm. However, if the original contract was not awarded through free and open competition which provided for follow-on work, it may be inconsistent with the open competition principle for this contractor to perform the follow-on work without an open competition and selection for that follow-on work.

In any case where the PRP claimant has previously hired the contractor, EPA would want to evaluate the capabilities of the contractor; the proposed role of such a contractor; the initial

procurement methods used to secure the contractor; the general scope of the original contract; and any other information that would assist the Agency in determining whether the procurement principles have been satisfied. If the potential claimant believes that costs for services of a contractor subsequent to preauthorization should be reimbursed, the potential claimant should be prepared to provide documentation that the contractor was initially selected using open and free competition. To avoid any difficulties, the potential claimant should carefully evaluate the available options and should propose an implementation strategy to EPA in keeping with the approach and intent of the procurement guidelines discussed above.

If you have questions regarding the appropriateness of mixed funding, please contact Deborah Swichkow in OWPE (475-7026). If you have questions regarding preauthorization requirements, contact William O. Ross in OERR (382-4645).